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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARK CRAIG WATHEN,

Defendant and Appellant.

A125041

(Lake County
Super. Ct. No. CR917543)

A jury found defendant guilty of two counts of felony domestic violence (Pen. Code, § 273.5, subd. (a)) and deadlocked on two counts charging felony criminal threats (Pen. Code, § 422) and misdemeanor battery (Pen. Code, § 243, subd. (e)(1)).¹ Defendant pleaded no contest to driving with a suspended license. (Veh. Code, § 14601.2.) The court suspended imposition of sentence for three years, granted probation and imposed conditions that included defendant serve 365 days in the county jail. Defendant filed a timely notice of appeal.

Defendant's counsel has filed a detailed opening brief that raises no issues and asks this court for an independent review pursuant to *People v. Wende* (1979) 25 Cal.3d 436. Counsel advised defendant that he could file a supplemental brief and he has not done so. We have reviewed the record on appeal and find there are no meritorious issues to be briefed.

¹ On motion of the district attorney, the court dismissed the two counts on which the jury could not reach a verdict.

Synopsis of Testimony

The conviction for count one charging felony domestic violence was based on a confrontation between defendant and his wife Misty Wathen on November 29, 2008, that involved disputed, contradictory facts. Misty Wathen testified her husband left their home two days before and had not returned. She returned home in the afternoon to find a 14-month-old baby on the couch, and the baby's mother, Stephanie Choate, who was her husband's secret girlfriend, in the bathtub. Defendant was on the back deck. Ms. Wathen ordered the woman out of the house. They exchanged profanities. Defendant confronted his wife and hit her with a tooth brush in the left eye, across her cheek, and later slapped her. Her vision was blurred. Defendant threatened to "gut" her if she called the police. As she fled in her truck, the front bumper slid across the back of defendant's vehicle, where Choate was sitting. She went to her sister's house and her sister called the police. Ms. Wathen gave a statement to the police and saw a doctor for her injuries.

The tape of the 911 call was played for the jury. Deputy Sheriff Francisco Rivera took a statement and observed redness on an eye and redness on Ms. Wathen's face. Her sister testified that Misty Wathen had a welt from the eyebrow to her cheek, and that one side of her face was red.

Ms. Wathen also testified about several other charged and uncharged acts of violence by her husband against her.

For the defense, Stephanie Choate testified that she had been in an intimate relationship with the defendant for six months and did not observe defendant commit any acts of violence that afternoon. She said that Misty Wathen threatened her and swore at her and rammed her vehicle with her truck.

Defendant testified that he and Misty were having marital problems. She became angry when she saw the baby on the couch. She grabbed his shirt and said she still loved him. Defendant told her he did not love her any more, did not strike her or threaten her, and walked out of the house. He saw his wife threaten Choate and smash the vehicle Choate was in from behind with her truck.

The conviction for count III was based on an altercation that occurred on November 26, 2008. Defendant was arguing with his wife. While she was on the toilet, he kicked her and then punched holes in the wall. He later grabbed her by the throat and punched her. She did not call the police.

Defendant denied that he did anything to his wife on November 26. They argued, but he did not kick or strike her. He testified Misty put the holes in the wall on November 29 when he was leaving.

Other confrontations unfolded during rebuttal and surrebuttal, including defendant's head butting his wife, which he denied.

Evidentiary Rulings

The court properly allowed testimony from Misty Wathen about a prior violent incident in July 2008 and another in September 2008. The court weighed their admissibility and found probative value under Evidence Code sections 1109 and 352.

After conducting an evidentiary hearing, the court properly allowed the jury to listen to Misty Wathen's statements in her 911 call as spontaneous statements under Evidence Code section 1240. The court ordered redaction of non-spontaneous statements.

The court properly allowed Misty Wathen's sister to testify about what Misty told her on November 26, about getting "into it" with defendant who had hit her. The statements rebutted the defense contention that nothing had gone on before November 29 when Misty allegedly fabricated what happened that afternoon out of jealousy.

Disposition

Defense counsel interposed objections and vigorously defended his client. Substantial evidence supports the jury's verdict in a case that turned on credibility of witnesses with divergent testimony. There was no error in the proceedings or sentencing. The judgment is affirmed.

Marchiano, P.J.

We concur:

Margulies, J.

Banke, J.